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## DEFINING TORTURE

David Sussman <sup>†</sup>

In the *On the Genealogy of Morals*, Nietzsche observes that “only that which has no history is definable.”<sup>1</sup> Torture has a long and varied history, and has indeed proved surprisingly resistant to any very clear definition in current debates about its use and justifiability.<sup>2</sup> The United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment<sup>3</sup> defines torture as

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>4</sup>

Unfortunately, the convention does not address the central question of what counts as the infliction of requisite sort of suffering here, or the broader context that might have to be in place to distinguish torture from other forms of coercion, manipulation, or intimidation. Donald Rumsfeld has insisted that the humiliations of Abu Ghraib were not “technically speaking” torture, but merely “abuse”, although he has yet to explain just what the technical distinction between torture and abuse is supposed to be.<sup>5</sup> In Northern Ireland, Britain employed what it called “interrogation in depth” against suspected Irish Republican Army sympathizers, using techniques that have been taken up by Israel and the United States (sometimes

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<sup>1</sup> FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 80 (Walter Kaufmann trans. 1989).

<sup>2</sup> See EDWARD PETERS, *TORTURE* 154 (1985).

<sup>3</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Torture Convention].

<sup>4</sup> *Id.* art. 1.

<sup>5</sup> U.S. Dep’t of Def., News Transcript: Defense Department Operational Update Briefing, <http://www.dod.mil/transcripts/2004/tr20040504-secdef1423.html>

described as “torture lite”).<sup>6</sup> Such interrogation involves the hooding of prisoners, keeping them in a room pervaded by the din of a large engine, fan, or loud music, depriving prisoners of food, water, sleep or medical care, and forcing them to stand at great lengths or to assume and maintain “stress positions”.<sup>7</sup> In the British case, the European Court of Human Rights ultimately concluded that these techniques, while constituting “inhuman and degrading treatment,” were still “not [quite] torture.”<sup>8</sup> Israel’s Supreme Court came to largely opposite conclusions.<sup>9</sup> Similar questions have arisen with regard to keeping prisoners naked or in darkness, subjecting them to extremes of temperature, prolonged questioning or isolation, or the administration of disorienting drugs, shaking, shouting, and mockery or threats directed to things that they hold dear. One might consider whether amputations or sterilizations conducted under anesthesia constitute torture, or the use of tasers or pepper spray to subdue inmates, or detention in squalid and unsafe conditions.

Much recent discussion of torture focuses on the severity of suffering involved. In a notorious memo, then Assistant Attorney General Jay Bybee argues that to constitute torture under Section 2340 of Title 18 of the U.S. Code, physical pain must be inflicted on a captive “of [such] an intensity akin to that which accompanies serious physical injury such as death or organ failure.”<sup>10</sup> What Bybee has in mind is unclear. It is hardly obvious that there is any distinctive level of pain that is associated with death (which can be quite painless) or organ failure (here the degree of pain would seem to have much to do with just what organ failed, and in what way, and in what broader context). Section 2340 also recognizes the infliction of “prolonged mental harm” as torture, where this harm results from the threat of physical pain or death, the administration of mind-altering substances (or the threat thereof), or the threat that another person will be subjected to any of these things.<sup>11</sup> Bybee interprets this condition to mean that mental harms constitute torture only when they engender some long-lasting psychological

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<sup>6</sup> See JOHN CONROY, *UNSPEAKABLE ACTS, ORDINARY PEOPLE: THE DYNAMICS OF TORTURE* 187 (2000).

<sup>7</sup> Mark Danner, *The Logic of Torture*, 51 *NEW YORK REVIEW OF BOOKS*, June 24, 2004, at 70.

<sup>8</sup> See CONROY, *supra* note 6, at 187 (discussing *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978)).

<sup>9</sup> HCJ 5100/94 Public Committee Against Torture in Israel v. Israel [1999] IsrSC 46(2) 150, *reprinted in* TORTURE 165-183 (Sanford Levinson ed. 2004).

<sup>10</sup> Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* 155 (2004) [hereinafter Bybee Memo].

<sup>11</sup> 18 U.S.C. § 2340(2)(A)-(D) (2000).

disorder.<sup>12</sup> This construction is hardly plausible. On this reading, a person could not have been psychologically tortured if he died during or shortly after his interrogation. Whether torture occurs here would now depend on such factors as the victim's psychological resilience, or the future availability of effective psychotherapy and medication.

There are no doubt better understandings of severe mental and physical pain than what Bybee offers. However, in the remainder of my remarks I want to reconsider torture is in light of another, relatively neglected connotation of suffering: passivity. What is distinctive of torture is not just the infliction of intense pain (however that is to be understood), but the experience of a kind of forced passivity in a context of urgent need, a context in which such passivity is experienced as a kind of open-ended exposure, vulnerability, and impotence. In order to make sense of the difficult cases above, we need to consider not just the intensity of pain that might be inflicted upon someone, but the alienation of the victim from his own bodily and emotional life that forced passivity before pain and fear can engender.

For torture to occur, its perpetrators and victims must see themselves as standing in a particular kind of relationship with one another, and understand that the other understands this as well. Characteristically, victims of torture see themselves as being completely at the mercy of their tormentors. A victim of torture must be unable to shield herself in any significant way, and must be unable to effectively evade or fight back against her tormenter. I may intentionally inflict great pain in a fight in order to make my foe do something; I may gouge his eyes in order to get him to stop choking me. Nevertheless, insofar as my opponent is not helpless before me, my eye-gouging is not an instance of torture, even though I am forcing him to comply with my desires by inflicting pain. Police who use tear-gas to disperse a crowd are not engaging in torture, regardless of how painful the gas may be. In these cases, the victims still have it within their power to resist or mitigate the violence done to them: by retreating, devising ways of protecting themselves, or countering their assailants with new threats of their own. In contrast, the torture victim realizes that he has no room to maneuver against his antagonist, no way to fight back or protect himself, and he must realize that his antagonist operates in an awareness of this as well.<sup>13</sup>

<sup>12</sup> Bybee Memo, *supra* note 10, at 120.

<sup>13</sup> "The other person, *opposite* whom I exist physically in the world and *with* whom I can exist only as long as he does not touch my skin surface as border, forces his own corporeality on me with the first blow. . . . Certainly, if there is even a minimal prospect of successful resistance, a mechanism is set in motion that enables me to rectify the border violation by the other person. For my part, I can expand in urgent self-defense, objectify my own corporeality, restore the trust in my continued existence . . . ." Jean Améry, *Torture*, in *ART FROM THE ASHES* 126 (Lawrence L. Longier ed. 1995)).<sup>13</sup>

The victim sees her tormentor as someone who can do anything he wants to her, who does not have to worry about answering any challenges or claims that the victim (or her representatives) might press against him. The torturer confronts no moral or legal impediments stemming from his victim's will, but is limited only by his own desires and interests, or the desires and interests of those he serves as an agent. The most intimate and private parts of a victim's life and body become publicly available tools for the torturer to exploit and enjoy as he will. The victim is completely exposed, while the torturer is free to conceal or misrepresent anything he likes. Typically, victims are kept in the dark about where they are, why they are being tortured, who might be making the ultimate decisions about their fates, how long they have been confined, or even whether it is day or night. The asymmetry of power, knowledge, and prerogative is absolute: the victim is in a position of complete vulnerability and exposure, the torturer in one of perfect control and inscrutability. Torture, even of the "lite" variety, strives to immerse its victim in a world of absolute arbitrariness and unpredictability. Anything may be done to the victim at any time. Questioning may be inexplicably abandoned, or shifted to obviously pointless subjects. Periods for eating and sleeping may be shifted or interrupted without warning, the environment may suddenly go from hot to cold; escalating pain may inexplicably be assuaged with some small seeming kindness.<sup>14</sup>

Normally a human being, or even an animal, confronts the world as an arena of action. The world presents itself as a broad context of threats and problems, but also as a fund of resources, in which the creature sees open ended possibilities of meeting its needs and responding to these challenges. Our emotions are the ways in which we see a situation as calling for some sort of response, as a sort of task inviting the exercise of our powers. Pain and pleasure are something our most basic awareness of the degree to which these basic powers and capacities are successfully realized in our environment. The thought here is fundamentally Aristotelian: a living thing just is a dynamic system of activities of perceiving, evaluating, and responding to an environment, a system that aims to maintain itself relative to various impediments and opportunities. This definition has an evident circularity, but it need not be vicious, at least if we can say more about just what these characteristic sorts of impediments and opportunities are, and what might count as the relevant sorts of response to them.

Such ongoing self-maintenance is not what the torture victim experiences. The victim's physical world is controlled so as to make it impossible for him to orient himself. That world is designed to close off any hope that the victim might harbor of coming to understand what he sees or learn-

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<sup>14</sup> For a fuller discussion of these considerations, see David Sussman, *What's Wrong with Torture?*, 33 PHIL. & PUB. AFF. 1 (2005).

ing more at his own initiative. He cannot hope to find out what is going on, and he can no longer approach his physical world as a context of potential resources or an arena of action. The torturer makes his victim experience a world that he cannot affect, except in the very specific ways the torturer is trying to elicit. The victim cannot fight back, cannot seek new tools, weapons, or strategies, and cannot appropriate any materials to his uses. His situation is dire (he is threatened, he must do *something*). Yet his basic capacities of perception and action confront not just a difficult or confusing world, but a world that is manifestly designed to give those powers no purchase.

Normally, we experience a kind of primitive unity of our emotions, bodies, and actions. We are our bodies, insofar as the body is the substance in which we express our emotional responses to the world in our actions. But the normal context of torture systematically negates this primitive expressive unity of mind and body. Unable to investigate or strive against the world, the torture victim instead confronts his own feelings, and his own body, as the primary source of threats and resources. Living agency is thus turned on itself, struggling not with its world through its feelings, but with its feelings as its world. Body and emotion are no longer integral parts of the victim's agency, but instead become what the victim, insofar as he can be perceptive or active at all, must exert himself against.

As torture progresses through greater pain, fear, disorientation and hopelessness, even the victim's body and emotions cease to be such an arena for action. The natural progression of torture makes the individual come to experience his body and feelings as being impossible to resist or strive against, just as he had been made to experience the physical world as impossibly alien and unmanageable. Elaine Scarry notes that "in prolonged and acute pain the body often beings to interpret all sensations as pain."<sup>15</sup> The self is driven further inward, ultimately becoming not a locus of activity, but rather a point of pure passivity, a vanishing point defined by the direction of the outside forces that have taken on what had been his active powers. The victim does not act through his body on the world; rather, the world acts through his body on him, where that 'him' is understood as just as a locus of suffering, as the thing that just has to "take it." The Central Intelligence Agency's Kubark interrogation manual describes this condition as the "debility-dependence-dread state" marked by limitless anxiety and helplessness, a condition that results when the victim is "cut off from the known and reassuring, and . . . plunged into the strange . . ."<sup>16</sup>

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<sup>15</sup> ELAINE SCARRY, *THE BODY IN PAIN* 55 (1985).

<sup>16</sup> DANNER, *supra* note 10, at 17 (citing CENT. INTELLIGENCE AGENCY, *KUBARK MANUAL* (1968)).

In *At the Mind's Limits*, Jean Amery recounts his torture at the hands of the Nazis.<sup>17</sup> For Amery, the experience was pervaded by

Astonishment at the existence of the other, as he boundlessly asserts himself through torture, and astonishment at what one can become oneself: flesh and death. The tortured person never ceases to be amazed that all those things one may, according to inclination, call his soul, or his mind, or his consciousness, or his identity, are destroyed when there is that cracking and splintering in the shoulder joints. That life is fragile is a truism he has always known. . . . But only through torture did he learn that a living person can be transformed so thoroughly into flesh and by that, *while still alive*, be partly made into a prey of death.<sup>18</sup>

I do not think that the sort of "living death" that Amery refers to here is just a rhetorical flourish. If what I have said is correct, Amery's description may be literally accurate. What Amery seems to have experienced is not death: that is, not the cessation or absence of thought, movement, consciousness, and activity. Instead, Amery seems to have experienced something like the opposite of life, a kind of active awareness of himself as a mere thing, as nothing more than that which is acted upon, a mere medium of another's "boundless" assertion. Normal death at least has the solace that, when one's living is over, so too is the ability to be aware of one's self as such. In torture, however, the victim remains alive to himself as a point of absence that confronts what had been himself (his body and feelings) as a fundamental threat. A living thing, I claimed, is essentially a system of activities meant to sustain itself through changes in its environment. In torture, this relation is reversed: The victim experiences himself as boundlessly threatened, but here there is little for that threatened self to be but simply that which is so threatened. If life calls for a special kind of respect or concern from us, then torture, insofar as it aims to transform life into a kind of anti-life, must be morally offensive in a way that is different from and perhaps greater than even killing.

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<sup>17</sup> JEAN AMERY, *AT THE MIND'S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* (1980).

<sup>18</sup> *Id.* at 136 (emphasis added).